No. 1770.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT 6

CHARLES W. CLARK,

Appellant,

vs.

THE ROSARIO MINING AND MILLING COMPANY (a Corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

TOBIN and TOBIN, and
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Attorneys for Appellant.

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Clerk U. S. Circuit Court of Appeals.

THE JAMES H. BARRY CO.,
1122-1124 MISSION ST.

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The brief filed on behalf of the appellee is misleading.

For instance, it is stated on page 4 and elsewhere in the brief that Sizer and Whitmore were to participate only in the event Clark bought the property. From the record, it appears that this arrangement was under a preliminary option contract made on December 12, 1900, in which the interests of Sizer and Whitmore were fixed at one-eighth each (Tr., pp. 200, 204, 218, 609, 610).

The contract in suit, dated May 1, 1902, obligated the parties equally (Tr., p. 23).

It is elementary that in this writing of latest date preliminary tentative negotiations merged.

Again, it is stated on page 4, that the material portions of the contract are set forth on the following pages 5, 6 and 7, but a glance at the contract in the record discloses that other very material provisions are omitted from this statement, among many others the foundation recital of ownership (Tr., p. 23).

Again, it is stated on pages 7 and 8 that the Court below found the contract to be ambiguous. A reference to the opinion of Judge Dietrich shows that what he determined was that under the rule of *expressio unius est exclusio alterius* there was no ambiguity, but that if this rule did not apply then the rule requiring the denial of specific performance of ambiguous contracts would apply. The conclusion reached was not that the contract was ambiguous, but that FAIRLY CONSTRUED IT "DISCLOSED AN INTENTION TO WITHHOLD " FROM COMPLAINANT THE RIGHT TO REQUIRE THE DE- " FENDANTS SPECIFICALLY TO PERFORM" (Tr., pp. 160-164).

It is stated on page 17 of appellee's brief and elsewhere therein that by overruling the demurrer to the bill Judge Morrow held that on its face it set forth a good and just cause of action for equitable relief, to wit, the specific performance of the contract, notwithstanding the provisions of paragraph 8 of the contract.

The history of Judge Morrow's ruling is given by Judge Dietrich in his opinion, and it appears that Mr. Burney, whose name is signed to this brief, has testified that the ruling on demurrer was made, "however, of course, *to be reconsidered upon the final hearing*" (Tr., p. 160).

On page 18 of appellee's brief is given what purports to be a quotation from defendant's answer, a reading of which would indicate merely a doubt on the part of the defendant as to the lack of jurisdiction.

A reference to the paragraph of the answer from which this comes shows that the doubt was that of all of the attorneys for the appellee, that the allegation was made in the answer to show the lack of good faith in the bringing of this suit in equity and that its maintenance was a part of a general scheme of fraud (Tr., p. 91).

It is unnecessary to go further to show the misleading character of the statements of fact contained in the brief.

The statements of law are equally misleading. For instance, this appeal is based upon the proposition that the contract in suit was made a part of the bill, that it showed on its face that the complainant below had no standing in a Court of Equity, and that, therefore, the demurrer to the bill should have been sustained. To meet this objection to the jurisdiction of the Court, on pages 12 to 16 of the brief are cited and discussed cases

supporting the view of the appellant that the contract was a part of the bill!

Again, the principal ground of appeal is that the Court never had jurisdiction. On pages 22 to 37 of the brief, omitting the discussion of the case of *Cathcart* vs. *Robinson* (5 Pet., 264), is a long list of cases holding that WHEN JURISDICTION ATTACHES the Court will retain it for ancillary relief. None of these cases holds that where the lack of jurisdiction appears in the bill the Court may by erroneously overruling a demurrer take and hold a jurisdiction to which it is not entitled. All of the cases hold that to support ancillary jurisdiction the original jurisdiction must have attached. Nor is the fact that a bill is filed on the equity side of the Court, and the Court by demurrer called upon to rule on the question of jurisdiction sufficient to warrant the Court thereupon to proceed with the cause if jurisdiction is lacking.

This very contention permeates the appellee's brief, notably on page 28, and the absurdity of it is shown in no case more strongly than in the one at bar.

The complainant entered into a contract which, in the language of Judge Dietrich, *"fairly construed dis-* *" closes an intention to withhold from the complainant* *" the right to require the defendants specifically to per-* *" form."* (Tr., p. 164).

The complainant sued for specific performance. The defendant Clark demurred expressly on the ground that according to its own showing the com-

plainant had no standing in a Court of Equity (Tr., p. 43).

Because by this demurrer the jurisdiction of the Court was attacked, the appellee claims the Court acquired jurisdiction to render a judgment at law by deciding that by its contract the complainant barred itself of the right to equitable relief.

Where in all of the adjudicated cases can authority be found for such a contention? Certainly not among those cited in appellee's brief.

On pages 37 to 54 of the brief is a discussion under the statement that the second point maintained on behalf of the appellant is a corollary of the first. This statement is itself misleading. The first point of the appellant is that the Court of Equity was without jurisdiction of the subject-matter of the suit. The second point deals exclusively with the constitutional right of the appellant to a jury trial upon the question of damages.

Under the misleading statement last mentioned, on page 38 and following it, are cases to the effect that specific performance will not be denied although the contract may give an adequate remedy at law. This principle is not questioned in the present case. It simply has no application to it. Here the contract provided that the complainant should not have specific performance. That was the ruling of the Court below. That ruling has not been appealed from by the appellee. This is not a case where the complainant

properly might have sued at law or in equity. It made its election when its attorneys prepared and its officers executed the contract in suit. It promised to sue at law only, and the appellant has the constitutional guaranty that it must abide by that promise.

On pages 55 to 77 of the brief is a discussion of the appellee's defective title. Whether the title is defective or not is not the principal question before this Court. That was the question presented by the pleadings to the lower Court, and the error on the part of the lower Court was in refusing even to consider the evidence on the subject. The title is defective in many respects, as set forth in the answer (Tr., pp. 93-114).

Two of the many defects are discussed in the opening brief, not in the hope that this Court would examine and pass upon the title but for the purpose of showing that there were real issues on the subject which in justice should have been fairly considered whether as a defense to a prayer for a strict decree of specific performance or to a purely money demand for damages.

In the appellee's brief cases are cited announcing the rule that where there are *known defects of title* and the vendee contracts to take such title as the vendor has he is bound by his bargain. These cases have no application here. It appears that the vendor asserted and still asserts its ownership of the property in fee, that the appellant believed when the contract was made that this assertion was true, and upon this assertion and this belief entered into the contract. The contract was pre-

pared by the attorneys for the appellee. It states the fact of ownership, and states the belief of the appellee, and then includes the clause that the appellee would transfer such titles as it had. Here was a clear mistake on the part of the appellant induced by the appellee in regard to the subject-matter of the contract. It was argued below and is argued here that the appellant is bound by this contract notwithstanding the mistake.

Novel, indeed, as a principle of equity, is the view that because there is a valid contract a defense based upon mistake is not to be considered.

The application of this new principle in the present case was carried even further. The fourth point presented by the appellant was as to the inequitable nature of the contract which bound the defendants to everything and bound the complainant to nothing. The lower Court did not discuss this matter in the opinion, but made its decree *because there was a contract.* We have always understood, and this Court recently announced in *Marks* vs. *Gates* (154 Fed., 481), that *"To "stay the arm of a Court of Equity from enforcing a "contract it is by no means necessary to prove that it is "invalid; from time immemorial it has been the recog- "nized duty of such Courts to exercise a discretion to "refuse their aid in the enforcement of unconscionable, "oppressive or iniquitous contracts, and to turn the "party claiming the benefit of such contract over to a "Court of Law."*

If there was a mistake in regard to the title would it

not have been unconscionable to require the defendants to accept imperfect title and to pay the full market price for it? Is it not oppressive to require one only of the defendants to pay $100,000 as a penalty for refusing to take that defective title?

The offer to purchase for $400,000 was made as a part of the consideration for a similar offer to sell at any time within a year for $600,000. An examination of this valid but unconscionable contract shows that the $600,000 option was a pretense only, which might have been asserted or withdrawn, as the whim of the appellee's directors might dictate. Is not such a contract iniquitous? Would any Court of Equity decree specific performance of it? Or, should any Court of Equity demand that the defendant protesting against it should pay a penalty of $100,000 solely because it was a contract?

The word penalty is used advisably. The decision of the Court below is sought to be upheld on the case of *Cathcart* vs. *Robinson* (5 Pet., 264).

In that case the alternative provisions of the contract was for a *penal* sum of $1000 in the event of non-performance. In this case the contract fairly construed disclosed an intention to withhold from the complainant the right to demand specific performance, and liquidated the *amount of damages* for a breach of it. The difference between a penalty and liquidated damages is too clear to warrant a very lengthy discussion. In the one case, if a certain stipulated act is not performed, the

person refusing to perform must pay a stipulated sum regardless of injury to the other. In the other, the person claiming damages must show his injury, and the amount of damages, at least in California, must be reasonable and commensurate with the injury proved. In this case no injury was proved. From anything that appears in the record the property is more valuable now than it was when the contract was made. New machinery was installed, old workings cleaned out, and many thousands of dollars spent in the betterment of the property (Tr., pp. 31, 202, 203, 208, 214, 215, 1508, 1509).

How could the appellee have been injured by the refusal of the appellant to buy the title in fee which the appellee asserted it owned and which the record shows it did not own?

A reading of the case of *Cathcart* vs. *Robinson* shows it is wholly inapplicable to the facts of this case, and it stands alone in the annals of equity jurisprudence as exacting a penalty. There the penalty was expressly provided for, here there was no provision for any penalty. The appellant had the right to a jury trial upon the questions of injury and damage and that right has been denied.

The law applicable to this case has been clearly announced by this Court in the case of *Marks* vs. *Gates,* (154 Fed., pp. 481-484,) cited above. The decision was by Judge Gilbert, the Court being composed of Judges

Gilbert, Ross and Morrow. In that case it was said: "The facts presented in the complaint are not such as to "entitle the Court to retain the case for the assessment "of such damages as the appellant may have sustained "for breach of the contract. *A Court of Equity will "not grant pecuniary compensation in lieu of specific "performance unless the case presented is one for "equitable interposition such as would entitle the "plaintiff to performance but for intervening facts,* "such as the destruction of the property, the convey- "ance of the same to an innocent third person, or the "refusal of the vendor's wife to join in the convey- "ance. *Cooley* vs. *Lobdell,* 153 N. Y., 596, 47 N. E., "783; *Matthews* vs. *Matthews,* 133 N. Y., 679, 31 N. "E., 519; *Bourget* vs. *Monroe,* 58 Mich., 573, 25 N. W., "514; *Eastman* vs. *Reid,* 101 Ala., 320, 13 South., 46; "*Milkman* vs. *Ordway,* 106 Mass., 232."

It is respectfully submitted that the present case does not come within the rule announced by this Court; and, further, that there is nothing in the appellee's brief to overcome the conclusions reached in appellants' opening brief, that the decree entered below should be set aside, and the case dismissed because of the defect of equity jurisdiction and of the right of the appellant to a jury trial.

Respectfully submitted.

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